II.

Here we should, perhaps, notice two further arguments against the justice or expediency of allowing *prima facie* protection to a mercantile agency.

Stress has been laid in one case upon the alleged fact that the mercantile agency virtually solicited the subscriber to enter into the contract, under which the information was subsequently furnished. But if the contract is regarded as otherwise legal, we do not see why the solicitation to enter into it should deprive the mercantile agency of the protection which would otherwise exist as to communications made in performance of the contract. Even where there is no previous relation between a communicator and communicatee, it is the better view that the volunteering of the information does not *ipso facto* exclude it from immunity. That is merely a circumstance to be weighed in case there is a controversy as to the defendant's motives.[76] And where the communication was in fulfilment of a duty legally incumbent on a defendant under a particular status or contract, the mere fact that the defendant originally offered to assume the status or to enter into the contract does not destroy any privilege which would otherwise exist. Thus a servant's right to use force in defence of his master would not be defeated by the fact that he originally applied for employment in the service of the master.

There are attempts to excite prejudice against a mercantile agency upon the ground that such an institution makes the pursuit and communication of information its sole occupation.[77] But that may be the case with a private agent exclusively employed by a single merchant; and still more frequently with a private agent employed by several merchants. And it is not supposed that this circumstance would destroy the immunity of the agent. Moreover, if a mercantile agency did not "make a business" of collecting information and having it on hand, its answers to inquiries by sub-

[76] See Bower, Code of the Law of Actionable Defamation, 128, note (*f*); 130, note (*gg*). Odgers, Libel and Slander (1st ed.) 207. 1 Ames' & Smith's Cases on Torts (ed. of 1910) 530, n. 1. And see Hamilton, L. J., in L. R. [1913] 3 K. B. 535, 536.

[77] "People who make a trade of collecting it for reward," Fitz Gibbon, L. J., [1908] 2 Ir. R. 514; "persons who make a business of possessing information about others, and of imparting it when inquired for, and inviting inquiries," Hamilton, L. J., L. R. [1913] 3 K. B. 542.

scribers would often be so long delayed as to be of little practical value. If it would be lawful for a merchant to employ a single person to obtain information as to applicants for credit, and if his subscribing to a mercantile agency is likely to result in his acquiring much more information, as well as obtaining it much more expeditiously and at much less expense, then it would seem that contracting with a mercantile agency is a reasonably necessary method of obtaining information. And, if the very fact—that the obtaining and imparting of information constitutes its sole business—is what its efficacy depends upon—why should that fact *per se* constitute an insuperable objection to its method of operation?

Upon the foregoing comparison of advantages and disadvantages (leaving out of view, for the present, the effect to be given to the existence of the motive of pecuniary gain), the conclusion seems decidedly in favor of the justice and expediency of allowing a mercantile agency the defence of conditional privilege.

This brings us to the discussion of the second main issue.

The second main issue for discussion is this:

2. Does the motive of temporal or pecuniary gain, on the part of the mercantile agency, furnish *per se* a sufficient reason for denying privilege; assuming that privilege would have been allowed but for the existence of such motive?

If, in defamation cases, there were no decisions and no dicta relative to motive, the solution of this question would occasion little difficulty to one who adopts our conclusion upon the first main issue just discussed.

The following general principles seem undeniable.

(1) Ordinarily, though not invariably, a man may legally employ another as his agent, or may contract with another as an independent contractor, to do for him what he might legally have done for himself.[77a]

(2) Where such legal employment or contract exists, the agent or contractor, who acts under it in good faith, is generally allowed

[77a] As to the applicability of the above Rule (1) to the present subject-matter, the writer is indebted to a legal friend for the following comment: "Of course this proposition is not applicable to a contract where there was a *delectus personarum;* and it might not apply if privilege were lost, as a matter of law, by the presence of a third person. But as the law on this point is well settled to the contrary, and as no question of a *delectus personarum* enters into the present case, it seems to come within the general principle."

by law to set up (rely upon) the interest of his principal or contractee as a justification for his acts in matters where there was no special interest of his own to be served (*i. e.*, no interest of his own, other than his general interest to perform fully his obligations to his principal or contractee).

And the setting up of such a defence is not precluded by the fact that the ulterior motive of the agent or contractor is to obtain pay for his services. (If this motive were held fatal, it would of course follow that no hired agents or contractors could ever justify acts done by them in the interest of the principal).[78]

We have heretofore attempted to show that, upon a balancing of advantages and disadvantages, it is expedient for the law to allow a wholesale merchant to contract with a mercantile agency to procure and furnish information as to applicants for credit. If our reasoning is correct, then such a contract is legal, the case falling under Rule 1 above.

If the contract is legal, then the motive of gain on the part of the mercantile agency does not prevent the application of Rule 2 above. And it follows that the defence of privilege, which could have been set up by the wholesale merchant if he had in person obtained (induced the giving of) the information, may be set up by the mercantile agency acting under contract with the wholesale merchant.

Lord Macnaghten's view is, in effect, that this case does not fall under Rule 1. He thinks that this is a case where the wholesale merchant cannot legally employ, or contract with, another party (at least not with such a party as a mercantile agency) to do for him what he himself could legally have done in person.[79]

For reasons heretofore given, we believe that Lord Macnaghten is mistaken as to the application of Rule 1. And if he *is* mistaken as to this, it is not apparent why Rule 2 does not apply.

Rule 2, when applied in regard to *Macintosh* v. *Dun*, presents the question: How far is the law peculiar to defamation affected

[78]Suppose an action for battery by B against X. Defendant X pleads he was the servant of A; and that he used only reasonably necessary force to defend A, his master, from an unjustifiable attack by B. Has it ever been held a sufficient replication to aver that X became the servant of A from the sordid motive of earning wages; or to aver the further fact that A took X into his service in consequence of X's soliciting the employment?

[79]The Judicial Committee of the Privy Council "thought, apparently, that the agreement under which the defendant was bound to make the communication was contrary to public policy." Griffith, C. J., in 11 Commw. L. R. (Australia), 371.

in its application by the law of agency, or by the law of contract? It often happens that a legal principle does not stand alone in its practical application. Its operation is frequently affected by some other legal principle or principles, which, impinging upon it, deflect from, or change, the result which would otherwise have ensued.[80] *Barwick* v. *English Joint Stock Bank*[81] was, so far as concerns the third count, an action of tort for deceit; and was so treated by the defendant who pleaded to that count "not guilty." In the subsequent case of *Houldsworth* v. *City of Glasgow Bank*,[82] Lord Selborne states the reason upon which the Barwick case was decided: "It is," he says, "a principle not of the law of torts, or of fraud or deceit, but of the law of agency."

Baker v. *Carrick*[83] is a case where a defendant in an action of defamation was exonerated by an application of principles of the law of agency. The defendant, a solicitor, who had made a certain statement, "was the representative of the person having the interest in making the communication, and was held to have precisely the same defence as his client would have had if he had been sued."[84]

The principle of the decision in *Baker* v. *Carrick* was reaffirmed by Bankes, J., in *Smith* v. *Streatfeild et al.*,[85] a case reserved for further consideration after a jury trial. This was an action for libel against the author and the printers of a letter. The plaintiff was a diocesan surveyor, whose re-election rested with the rural deans. One of the defendants, Canon Streatfeild, rector of a parish, wrote a letter as to plaintiff's conduct in relation to a certain survey, had the letter printed by the other defendants, and sent a printed copy to each of the rural deans. The occasion was regarded as *prima facie* privileged. It was held that Canon Streatfeild did not forfeit his privilege by having the letter printed,

[80]See Bishop on Written Laws, § 118 a.

[81](1867) L. R. 2 Exch. 259.

[82](1880) 5 A. C. 317, 326.

[83](1894) 70 L. T. Rep. [N. S.] 366, s. c. L. R. [1894] 1 Q. B. 838.

[84]Bower, Code of the Law of Actionable Defamation, 132, note (*i*). "If * * * the occasion would have been privileged in respect of his client, it is also privileged in respect of the solicitor." Lord Esher, M. R., 70 L. T. Rep. [N. S.] 367. The defendant "stands in the same position * * * as Copley" [the client] "would have done." Lopes, L. J., 70 L. T. Rep. [N. S.] 368. "It is not disputed that, if the statements had been made by Copley, the occasion would be privileged, but it is said that because the statements were made by Copley's solicitor the occasion was not privileged. No authority or principle has been adduced in support of that proposition." Davey, L. J., 70 L. T. Rep. [N. S.] 368. See also Odgers, Libel and Slander (5th ed.) 87 and 290.

[85](1913) 109 L. T. Rep. 173, s. c. L. R. [1913] 3 K. B. 764.

which was regarded as a natural and proper course to take. It was further held that the privilege created by the facts above set forth was not confined to the author of the letter, but extended also to the printers. The jury, in answer to special questions, found that Canon Streatfeild was actuated by "express malice" towards the plaintiff, but that the printers were not. It was, of course, held that Canon Streatfeild's defence of privilege was defeated by the existence of express malice on his part. It was also held that the existence of express malice on the part of the author defeated the defence of privilege set up by the innocent printers. Upon this ground, and upon this ground alone, Bankes, J., decided that the printers were liable as well as the author. The learned judge fully recognized the doctrine, that, if the occasion was *prima facie* privileged in respect to the author, it was also privileged in respect to the printers; *i. e.*, that the printers, in respect to privilege, stood as well as the author. But he held that they stood no better than the author; and that the existence of wrong motive on the author's part "destroyed the privilege not only for him, but for the printers also." This view has been paraphrased thus: "that the printers have no privilege of their own, but can only shelter themselves behind the privilege of the author of the libel; they array themselves in his armour, and take his accoutrements with all faults."[86] Whether Bankes, J., was, or was not, correct in holding the printers liable upon the ground last stated, is not a question for discussion here. So far as the subject of the present article is concerned, the essential point in the opinion of Bankes, J., is, that it proceeds throughout upon the theory that the printers can maintain the defence of privilege whenever the author can maintain it. In other words, Rule 2, *ante*, applies to the case of the printers.

In the above cases, the agent or contractor was imparting (or aiding in imparting) information to third persons. But the same principles would generally apply to an agent or contractor who, acting in the line of his duty, was collecting information from other persons for the benefit of his principal or contractee. If the principal or contractee would have been privileged in asking for and receiving the information, the agent or contractor would usually be privileged also.

Our discussion of the second main issue has thus far proceeded upon very general grounds, without adverting to specific views as

[86] See 136 Law Times, 26.

to wrong motive expressed in various defamation cases. These views, however, cannot be passed over. Their meaning, application and effect must now be considered.

Where the making of a communication is *prima facie* protected on account of the interest of the recipient, what constitutes such a wrong motive on the part of the communicator as to defeat an otherwise valid claim of immunity? What answers to the above question are to be found in judicial opinions?

One view is, in substance, as follows: A wrong motive is any motive but the right one.[87] Upon this view, it may be argued that, in the case of a communicator who has no interest, the sole right motive is a purely unselfish desire to benefit the recipient. It will be contended that such a defendant, in order to be immune, must have "acted as an altruist, seeking only the good of another and careless of his own advantage."[88]

---

[87] In Clarke *v.* Molyneux (1877) L. R. 3 Q. B. D. 237, Brett, L. J., said (p. 246): "If the occasion is privileged, it is so for some reason, and the defendant is only entitled to the protection of the privilege if he uses the occasion for that reason. He is not entitled to the protection if he uses the occasion for some indirect and wrong motive." And Bramwell, L. J., said (p. 245), that "if the defendant was actuated by some motive, other than that which would alone excuse him, the jury may find for the plaintiff."

[88] It certainly is not universally true that the taint of selfishness in the defendant's motives will prevent him from successfully maintaining the defence of conditional privilege (*alias* defeasible immunity). Where defendant makes (by an honest and non-negligent mistake) a defamatory statement in the protection of his own interest, the selfishness of his motive does not cut him off from the defence of conditional privilege. On the contrary, this selfish motive—the fact that there was an interest of his own to be protected—furnishes the foundation of his claim to immunity.

The defendant, in such a case, was not discharging a legal or moral duty owed by him to a third person. He "was acting solely for his own benefit; and, if that which he did was lawful, it must be so because it was an act done in the conduct of his own affairs in a matter where his interest was concerned." Cresswell, J., dissenting in Blackham *v.* Pugh (1846) 2 C. B. 611, 623.

It might seem that, if the motive of serving his own pecuniary interest does not make it unlawful in A to ask B for information as to the character of X, then the motive of serving B's own pecuniary interest, by obtaining pay for the information, does not make it unlawful in B to impart such information to A. It might be asked, If A does not act at his peril when he inquires from a selfish motive, why should B act at peril when he answers from a selfish motive? See Morris, J., 18 Fed. 216.

But it will be said that that case is not, in legal contemplation, the same as the present. The law, it will be contended, may allow a man more liberty to make mistaken defamatory statements in defence of his own interests than when the effect of the statement (if true) would be to protect the interest of a third person. See Isaacs, J., in 11 Commw. L. R. (Australia) 388.

There is another form of words used to express the same idea, and leading substantially to the same result. In this form the word "duty" is a prominent term. It is said that the only right motive is that of protecting the interest or discharging the duty which gives rise to the occasion. And it is added that while "duty" is not confined to legal duties (enforceable by law), there must be, at least, a moral or social duty; such that a failure on defendant's part to perform it would be morally censurable. In effect, the proposition is that there must be a moral or social duty resting on a defendant to make the communication; and, in making it, he must be acting solely from a sense of duty.[89] It is also said that the sense of duty must be one that an average man could reasonably entertain.[90]

If the above strong statements, as to motive or duty, are to be applied to all conceivable situations, then it might seem that mercantile agencies cannot claim immunity. The managers of these agencies are not actuated solely by the motive of protecting the interest of another, or of discharging a duty towards him. While those objects may constitute their immediate purposes, yet their ultimate motive is to obtain pay for their information and services.

But the above propositions are not applicable to all persons in all conceivable situations. They may apply to statements made by the interested parties themselves or to statements made to the interested parties by pure volunteers; but it does not necessarily follow that they apply to third persons acting under employment by, or under a contract with, the immediately interested parties.

When the reason for holding an occasion *prima facie* privileged consists in the reasonable necessity for protecting the interest of a particular person, that interested person generally can himself have only one right motive, either for making statements to third persons, or for inciting third persons to acquire information and impart it to him through intermediate channels. That sole right

[89]"The bridge of immunity by reason of duty needs support at one end by the duty itself, and at the other end by the sense of that duty. If there be a want of support at either end, the whole structure falls." Isaacs, J., 11 Commw. L. R. (Australia) 388.

[90]See Odgers, Libel and Slander (1st ed.) 207, 208, 211. If the burden is on the defendant to prove the existence of circumstances giving rise to the duty, nevertheless the burden is on the plaintiff to prove that the defendant, in making the communication, was not acting under a sense of duty, was not actuated solely by a sense of duty. See Bower, cited elsewhere, as to burden on plaintiff to prove that defendant was acting from wrong motive.

motive is the protection of his own interest. Any other motive would generally defeat his *prima facie* immunity.[91]

Again: Suppose that a pure volunteer, one who acts entirely of his own motion and without a semblance of request, gives to an interested person information reasonably necessary for the protection of the interest of the recipient; and suppose too that there were no previous relations between the speaker and the hearer. It might be held that the giver of the information was outside the pale of immunity, if he were actuated by any motive other than the purely altruistic one of benefiting the recipient; in other words, if he were actuated by any motive other than that of discharging a social or moral duty which the speaker owed to the hearer.

But now suppose that a person, in need of information for his own protection, employs an agent to ascertain facts and communicate them to him; and suppose too that this is a reasonably necessary method of acquiring the information. Is that agent liable merely because he himself is not actuated by the highest possible motive? Does the agent forfeit the immunity *prima facie* arising from the situation and wants of his employer, merely because his own ulterior motive is a desire to obtain pay for the work? An affirmative answer must have the effect of materially diminishing the probability that information will be obtained by the person who needs it for his own protection. He would then be likely to be confined to the receipt of gratuitous information, given to him solely from purely philanthropic motives.

The distinction between the case of the pure volunteer and the hired agent is apparent in the discussion of Qualified Privilege in the fifth edition of Odgers on Libel and Slander. The learned author puts in separate compartments two classes of cases.

One of his divisions comprises:

---

[91] The phrase "discharging a duty" seems inappropriate to the case where the party whose interest gave rise to the occasion is himself the defendant on the record. The expression, "exercising a right," seems preferable in such a case; and may be better in all cases.

In Davies *v.* Snead (1870) L. R. 5 Q. B. 608, 611, Blackburn, J., said: "Where a person is so situated that it becomes right in the interests of society that he should tell to a third person certain facts, then if he bona fide and without malice does tell them, it is a privileged communication." In the later case of Waller *v.* Loch (1881) L. R. 7 Q. B. D. 621, 622, Brett, J., said: "I think that the definition by Blackburn, J., in Davies *v.* Snead (L. R. 5 Q. B. 608, 611) is the best. It leaves out all misleading words, saying nothing about 'duty,' and states in plain terms what I conceive to be the true rule."

"Communications made in discharge of a Duty arising from a Confidential Relationship existing between the parties."[92]

Another division embraces:

"Information volunteered when there is no Confidential Relationship existing between the parties."[93]

As to the latter class, he says: "But in every case the test would appear to be, Did the defendant act under a sense of duty, or from any motive of self interest?" His opinion would seem to be that here the defendant must be acting solely from a sense of duty, solely from philanthropic motives; and that, if he is in any degree influenced by a self-seeking motive, the privilege is defeated.

But as to the former class, some of his instances of communications protected by reason of Confidential Relationship are cases where the ulterior motive, or at least one of the ulterior motives, of the informant is that of pecuniary gain. Among his instances of Confidential Relationship on page 260 are the relationship existing between "master and servant, principal and agent, solicitor and client." In all these cases Mr. Odgers apparently (and we think rightly) believes that, if the immediate purpose of the servant, agent, or solicitor is to impart to his employer information requisite to protection of that employer's legitimate interests, then the communication is protected. Yet all these relationships have their origin in contract; and in each instance the ulterior motive, or at least one of the ulterior motives, of the servant, agent, or solicitor is to entitle himself to compensation. The chance of obtaining compensation is one of his motives (generally his dominant motive) for entering into the contract and for carrying it out.

The question here is, whether an ulterior motive on defendant's part of obtaining compensation for services in acquiring and communicating information is necessarily and invariably such an objectionable motive as to defeat the defendant's otherwise valid claim to immunity? If the information is furnished by the defendant to an interested party at the latter's request, not from motives of pure philanthropy but as a matter of business from which defendant is to derive compensation, does this necessarily constitute an "abuse" of the privileged occasion?

What is the object of the law in allowing conditional privilege?

[92] P. 259.

[93] P. 263.

For what reason does the law in this instance grant *prima facie* immunity?[94]

The law says that in the absence of wrong motive, communications to protect a legitimate interest of the recipient are conditionally privileged. In other words, the protection of a legitimate interest of the recipient is what makes the occasion privileged. Why does the law recognize such an "occasion" as privileged?

Does the law deem the occasion privileged because of the regard which the law entertains for the person who gives the information?

No. The reason is because of the regard which the law has for the interest of the recipient of the information, because of the desirability of allowing him to acquire information which is reasonably necessary for the protection of his interests. Where the recipient is a merchant, "the interest of the merchant is the predominant fact, and it is that which furnishes the test of the privilege."[95] The protection is "derived from the relation in which the receiver of the information stands to the person who is the subject of it. * * * It is clear that the rule is founded on a consideration of the importance of the information to the interest of the receiver. And this consideration has no reference to the source whence the information is derived."[96] To determine whether the occasion was *prima facie* privileged, "the inquiry should be who *got* the information and not who *gave* it."[97] So far as concerns this branch of the case, "the inquiry is not how did the defendant acquire the information, nor whether he received compensation therefor, but was the occasion one which justified him in giving such information as he possessed to the applicant."[98]

Immunity is not conferred upon the giver of information on account of any special affirmative merit on his part; though it may be forfeited by reason of positive demerit on his part. The protection (the immunity) which the law conditionally allows to the giver of the information is not allowed as being in itself the chief object of the law; but rather as a reasonably necessary incident to the

[94]The question whether the occasion is *prima facie* privileged is entirely distinct from the question whether the privilege, if it ever existed, has been forfeited by abusing the occasion. See Griffith, C. J., 3 Commw. L. R. 1140, 1148-9.

[95]6 Commw. Law. Rev. 108. And compare Wightman, J., in Gardner *v.* Slade (1849) 13 Q. B. 796, 801.

[96]Erle, J., in Coxhead *v.* Richards (1846) 2 C. B. 569, 608.

[97]6 Commw. Law Rev. 109.

[98]Woodruff, J., in Ormsby *v.* Douglass (1868) 37 N. Y. 477, 485.

protection of the interests of the recipient; a necessary means of allowing the recipient a reasonable opportunity to acquire information which is requisite to the protection of his interest. "It is hard to see * * * why the mere fact that an individual or a company realizes compensation for their information should make the communication of that information, under faithful and confidential limitations, not to the interest and welfare of society."[99] "The mere fact that the agent is paid for furnishing the information is, in itself, no reason for withholding the privilege, if it be shown that the person originally setting the agency in motion has an interest in the inquiry."[100] "It would seem to make no difference that the information is paid for."[101] "If a trader writes to a merchant asking for information and does not offer to pay him for his trouble in answering, is the answer privileged, but not so if the trader does offer to pay for the merchant's time and trouble?"[102]

Assuming that the chief object of the law in granting immunity to the giver is to benefit the receiver, can it be desirable to impose conditions of immunity, or to allow methods of defeating *prima facie* immunity, so stringent as to discourage the giving of information, and thus to diminish materially the probability that the desired information will be obtained by the persons in want of it? Should the immunity (the proffer of immunity) be clogged with such onerous conditions as would seriously impair the chance of the merchant's acquiring the desired information (the chance that the desired information would be communicated to the person who needs it for his protection)?

The plaintiff in these cases does not occupy the position of one who never gave any other person occasion to investigate his standing. On the contrary, his own act in applying for credit is what set on foot the investigation by the wholesale merchant, of the results of which he now complains. He cannot reasonably find fault because the wholesale merchant, to whom he applies for credit, attempts to obtain information concerning his financial responsibility. The making of such an attempt is a natural consequence of his own application. Can he object to the use of reasonably efficient methods of investigation? Can he demand that the law shall so limit or restrict the methods of investigation as to render them practically inefficient? Can he

[99]57 Pennsylvania Law Rev. 180.

[100]Burton, J. A., in Todd *v.* Dun (1888) 15 Ont. App. 85, 91.

[101]Osler, J. A., in Robinson *v.* Dun (1897) 24 Ont. App. 287, 292.

[102]Bray, J., in L. R. [1913] 3 K. B. 507, 552.

reasonably insist that all investigation shall be conducted by the wholesale merchant in person, and that no agent or contractor shall be employed to obtain or furnish information?[103]

It is obvious that the adoption of a stringent view as to motive would tend seriously to diminish the communicatee's prospect of obtaining the desired information. If the law regards the desire of the communicator to earn compensation as necessarily and always a bad motive, then the communicatee is much more likely to be restricted to information given gratuitously and from purely altruistic motives.[104]

Should the law say that the merchant must be confined to such information only as may be gratuitously furnished to him from purely altruistic motives? It seems more reasonable to say, that the person in need of the information should be permitted to employ such methods (not intrinsically objectionable) as are likely to result in his obtaining the information. Whenever it is a reasonably necessary method of protecting his interest (and in some cases it certainly would be so), should not the law allow him to make contracts for the acquisition of information and to pay for the same? Should not the law allow him to make such contracts, either by employing a private agent, or by contracting with some person or institution regarded not as his agent, but as an entirely independent party?

---

[103]See editor's note in 1 Amer. Lead Cases (5th ed.) 205, 210.

[104]In Greenlands *v.* Wilmshurst, L. R. [1913] 3 K. B. 542, Hamilton, L. J., is reported as saying, in effect, that a decision disallowing conditional privilege in the case of a mutual trade protection society "will not extinguish or hamper such businesses."

Even if a decision of this sort would not completely suppress such an institution as a mercantile agency, yet it would tend to make its work of much less value to its subscribers. If there were no *prima facie* protection in cases of mistake, it would be much more difficult for the home office of the mercantile agency to obtain full and frank statements from local correspondents.

Some experienced judges have thought that the denial of *prima facie* protection would render it not merely difficult, but practically impossible, to obtain full and accurate information. Tindal, C. J., said that if communications from one tradesman to another are not protected by the law, "no man would answer an inquiry as to the solvency of another." 2 Bing. N. C. 381. Erle, C. J., said: "If every word which is uttered to the discredit of another is to be made the ground of an action, cautious persons will take care that all their words are words of praise only, and will cease to obey the dictates of truth." 15 C. B. [N. S.] 418. O'Connor, J., said: "If an agent is to be protected only in the making of statements which he can guarantee to be true, the practical advantage of the association's system would be at an end. Obviously its effectiveness can be secured only by making the occasion of the communication a privileged occasion, which will protect from action or prosecution all statements." 11 Commw. L. R. 378.

If it is held lawful for the recipient thus to contract with third persons to acquire information and impart it to him for compensation to be paid, then it must also be lawful for these third persons to perform such contracts and to receive such compensation. And acts done by such third persons under a lawful contract, (the performance of the contract on their part by thus acquiring and imparting information), ought not to be deprived of protection merely because the third persons, in performing their contracts, are also actuated by the ulterior motive of obtaining compensation.

The protection, we repeat, is not afforded because the law wishes to furnish the giver of the information a chance to earn money. It is afforded him because the law wants to furnish the recipient a reasonable chance to acquire information requisite for the protection of his legitimate interest; and because the protection to the giver of the information is a reasonably necessary means to that end.

Does the making of a contract to supply information to another necessarily and always carry with it (involve) immunity for the communication made in pursuance of such a contract? Does the mere isolated fact that a defendant had contracted to supply information necessarily create such a situation as will render communications made in pursuance of the contract privileged?

Certainly not. There must be a legitimate interest in the recipient; and the information, if correct, must be reasonably necessary to the protection of his legitimate interests. And this interest in the communicatee (the interest requiring protection) cannot be "manufactured by the agreement." It "must exist *aliunde*."[105] A contract to furnish information cannot be an element in creating immunity in a case where the recipient, at the time of carrying out the contract, has no legitimate interest to be protected.[106] And this "interest" of the recipient must be something more than the mere gratification of his curiosity or love of gossip; he must be "interested" in the communication "as a matter of substance apart from its mere quality as news."[107] Nor is it always sufficient that the possession of the information may enable the recipient to acquire pecuniary profit. It is not every business communication which (if incorrect) falls within "the

[105]See Higgins, J., 11 Commw. L. R. 394.

[106]The contract cannot create an interest which requires protection. But if such interest exists *aliunde*, then the contract may furnish an effective means of protection, and hence afford ground for immunity.

[107]See Higgins, J., 11 Commw. L. R. 398.

area of protected defamation." There are many communications of a defamatory nature which can be made only at the peril of the informant; at the risk of his being held liable in case they prove to be incorrect. Suppose that a newspaper publisher contracts with a correspondent that the latter shall, for pay, furnish truthful items of news for the "Society Column." We assume that this contract is not unlawful; and that either party could sue the other for a breach of it. Yet if the correspondent furnishes, in good faith, an incorrect statement (which, if untrue, is *prima facie* actionable) and the publisher, in good faith, prints it, the publisher, if sued for defamation, cannot claim immunity on the ground of privileged occasion.[108] Neither can the correspondent set up this defence, if the defamation action is brought directly against him. The occasion is not a privileged one. Both parties to the contract contemplate the publication of these items to the entire community; and this too without any idea of giving members of the community information requisite for their protection in their business transactions. There is certainly a distinction between scattering news items broadcast throughout the community, and furnishing information confidentially to only those members of the community who have special reasons for acquiring the information in order to protect their own legitimate business interests.

Shall we go so far as to say that motive is utterly immaterial in the case of an agent or contractor, who furnishes information at the request of a person whose interest requires its acquisition? Shall we say that the *prima facie* protection of the agent or contractor cannot be forfeited by the existence, on his part, of any conceivable wrong motive?

By no means. If, in addition to the motive of receiving pay, the agent or contractor is also actuated by the motive of personal ill will towards the person who is the subject of the communication, his *prima facie* immunity is thereby defeated.[109]

---

[108]The proprietors of newspapers have no special privilege as to the publication of defamatory statements. Bower, Code of the Law of Actionable Defamation, 225, note (*b*), 437-439; Barnes *v.* Campbell (1879) 59 N. H. 128.

[109]Sometimes it seems to be tacitly assumed that a man always acts from a single motive, that his motive is one and indivisible, that no man ever has more than one motive for his action. This is contradicted by human experience. A man is frequently actuated by more than one motive. "He may act from two or more concurrent motives instead of from one only." Salmond, Jurisprudence (ed. of 1902) 418. "It is seldom a man does any one thing prompted by one motive alone, to accomplish one end." 1 Bishop, New Criminal Law, § 337. See also 8 Law Quart. Rev. 143.

And so in case of any other positively wrong motive. But we submit that the motive of obtaining compensation is not *per se* a wrong motive in a person standing in the supposed relation to the communicatee.[110] The term "wrong motive," when used in reference to persons standing in the above supposed relation of agent or contractor, should be understood as meaning nothing less than a motive which would be deemed "morally reprehensible" by persons of ordinary intelligence and character.[111]

The foregoing views lead to the result which was sustained by the weight of authority until the decision of the Judicial Committee of the Privy Council in *Macintosh* v. *Dun.*

Our specific criticisms upon Lord Macnaghten's opinion in that case can be gathered from the previous discussion; but may now be briefly summed up, as follows.

As to matters of fact:

The opinion evinces unfamiliarity with the methods and practical necessities of modern business. The writer does not appear to realize fully either the nature or the importance of the information furnished by mercantile agencies. It is an attempt to establish a rule of law founded upon a mistake of fact as to the reasonable necessity of adopting certain modern business methods.[112]

---

[110]Sometimes it seems to be assumed that, in every case, there can be only two kinds of motives: those which are, under all circumstances, wholly good; and those which are, under all circumstances, wholly bad. A different classification, however, is suggested in 1 Austin, Jurisprudence (3rd ed.) 165, where motives are divided into "such as are good, such as are bad, and such as are neither good nor bad." It would seem that some motives are not intrinsically or invariably bad motives; but may be good motives on the part of some people under some circumstances, while bad in other people under other circumstances. Of course, there are specific cases where only two kinds of motive are conceivable; where the defendant was actuated either by the highest possible motive, or by a positively wrong motive.

[111]See 8 Law Quart. Rev. 141. See also a substantially similar expression used in a somewhat different connection; Lindley, L. J., in Stuart *v.* Bell, L. R. [1891] 2 Q. B. 341, 350.

The phrase "sinister motive" is used in 8 Law Quart. Rev. 144, to describe the motive which will defeat conditional privilege.

In Fahr *v.* Hayes (1888) 50 N. J. L. 275, 279, Dixon, J., said (the italics are ours): "By express malice in this connection is meant some motive, actuating the defendant, different from that which *prima facie* rendered the communication privileged, *and being a motive contrary to good morals.*"

[112]We think that the usefulness of a mercantile agency to wholesale merchants is under-estimated by Lord Macnaghten; and, on the other hand, the damage caused by the agency reports to applicants for credit (as a class) is over-estimated. It is probable that those reports are, in a decided majority of instances, favorable to the applicant. See references, *ante*, p. 199 to the views expressed by Mr. Charles O'Connor and Mr. Justice Wightman.

As to matters of law:

The opinion leaves out of view the general principle by which an agent finds protection under the legitimate interest of his employer. The opinion does not pay sufficient attention to the chief reason for holding the occasion *prima facie* privileged, *viz.*, to protect the interest of the recipient. The writer does not appear to realize fully that conditional protection to a mercantile agency, if allowed by law, would be allowed as a necessary means or incident to the protection of the recipient, rather than on account of any special merit on the part of the informant.

There are three different parties whose rights and interests may be affected by the decision. Lord Macnaghten seems to look mainly at only two of these parties; and gives comparatively slight consideration to the third party, the one upon whose account the occasion might be deemed conditionally privileged, the one whose interest really constitutes the occasion a privileged one. He largely ignores the position and interests of the communicatee; in other words, he does not sufficiently give heed to the considerations arising from the reasonable necessities of the wholesale merchant's business. This view seems fairly open to the following comment of Mr. Justice Cussen:[113] "It seems to me that too much stress is laid on the unsavoury character of the defendants' business, and not enough consideration given to the interest which existed in the person to whom the defendants furnished the information."

As to the collateral effect of Lord Macnaghten's opinion, *i. e.*, its effect as to parties other than mercantile agencies:

(a) It carries too far. The reasoning, worked out to its logical conclusion, would overthrow the doctrine that *prima facie* protection is afforded to a private agent employed exclusively by a single principal. It has hitherto been supposed that protection in such a case is not defeated by the fact that the agent's ulterior motive is to obtain pecuniary compensation, nor by the fact that the agent solicited the employment.

(b) Has it not another important effect? Does not the principle applied in *Macintosh* v. *Dun* necessitate the denial of conditional privilege in the case of a mutual trade protection society?

Suppose that a number of merchants doing business in a particular locality unite to form a mutual trade protection society, for the purpose of acquiring and imparting to each other informa-

[113] 6 Commw. Law Rev. 108.

tion as to the solvency of possible or actual customers. Suppose that each merchant agrees to impart to the other members, or to an officer of the association, whatever information he may have or acquire as to customers. Suppose that the association also employs a secretary to obtain and impart information. Is information given by one member to another *prima facie* privileged? Is information given by the association, or by its secretary, to an individual member privileged?

Since the decision in *Macintosh* v. *Dun,* the question of privilege in the case of these mutual associations has arisen in both the British and Australian courts; and there is a conflict of authority upon it.

The immunity of the communication is sustained in Scotland, and by a majority of the High Court of Australia.[114]

The opposite view is sustained by the ruling of the trial judge in two recent English cases; and by the decision of a majority of the Court of Appeal, sustaining one of these rulings.[115]

---

[114]Barr *v.* Musselburgh Merchants' Ass'n (1911) Scotch Session Cases, 1911-12, 174, s. c. 49 Scottish L. R. 102, 2 Scots L. T. 402; Howe *v.* Lees (1910) 11 Commw. L. R. (Australia) 361, overruling Peatling *v.* Watson, Vict. L. R. (1909) 198.

[115]Elkington *v.* London Ass'n for the Protection of Trade, before Darling, J., (1911) 28 Times L. R. 117; Greenlands *v.* Wilmshurst, before Lord Alverstone, C. J. (1912) 29 Times L. R. 64; same case in Court of Appeal, L. R. [1913] 3 K. B. 507.

The facts in Greenlands *v.* Wilmshurst, L. R. [1913] 3 K. B. 507, are stated at length in the first head-note substantially as follows:

An unincorporated body called the London Association for Protection of Trade was formed in 1842 for the purpose (*inter alia*) of making inquiries as to the commercial standing and credit of traders. It consisted of such persons as might be elected members, no particular qualification for membership being required. The business of the association was carried on under the superintendence of an unpaid committee of management. Members paid an annual subscription which entitled them to a certain number of inquiries free, and to a further number for an additional payment. The association had accumulated funds which by its rules had to be dealt with in furtherance of the objects of the association and no part of which had ever been divided among the members.

A member of the association applied for information as to the commercial credit of the plaintiff company. The secretary of the association (Hadwen) applied to a third person (Wilmshurst) for the information, who made a report, for which he was paid a fee (by the association), containing untrue and defamatory statements of the plaintiff company. The secretary sent a report in substantially the same terms to the member. In respect of the secretary's report the plaintiff company brought an action for libel against the association, the secretary, and the third person (Wilmshurst). *Held,* by Vaughan Williams and Hamilton, L. JJ. (Bray, J., dissenting), that the report was not published on a privileged occasion; affirming in this respect the ruling of Lord Alverstone, C. J., at the trial. See 29 Times L. R. 64.

In the above case, Vaughan Williams, L. J., and Hamilton, L. J., both held that the business was carried on by the association, *inter alia,* for profit; and that the case was not distinguishable in this respect from

It seems to us that the principle of the decision in *Macintosh* v. *Dun,* if correct, applies to the case of a mutual trade protection society. The motive of temporal advantage (or pecuniary profit), which in *Macintosh* v. *Dun* was thought fatal to privilege, really exists here. These different merchants have no common or united interest akin to that which exists (in reference to corporate property) between stock-holders in the same manufacturing corporation. The interest of each member of this trade protection society is separate and distinct from that of the others.[116] Each merchant, in giving information to his associates or to the official, is actuated by the motive of ultimately benefiting his own pecuniary interest. His own action is influenced by the hope of receiving, in his turn, information from his associates or from the association officials. No merchant joins the association from purely altruistic motives, from a disinterested desire to protect the interests of his neighbors. His dominant motive is to acquire information which will enable him to protect his own interests.[117]

Macintosh *v.* Dun. See pp. 527 and 536. Vaughan Williams, L. J., also inclined to the view that the fact that the information was bought by the association from Wilmshurst was fatal to their claim that they were privileged in afterwards giving out the information to one of their members. See pp. 520-522, and 526. Both the learned judges indorsed the opinion of Lord Macnaghten in Macintosh *v.* Dun. See pp. 524, 527-8, 543. There is now a tendency in some English judges to adopt the reasoning of Lord Macnaghten in that case; although the decision of the Judicial Committee of the Privy Council is not binding upon the English courts as an authority. Lord Macnaghten's view is approved in Bower, Code of the Law of Actionable Defamation, 437-8, and preface, x.

[116]See Hodges, J., in Peatling *v.* Watson, Vict. L. R. (1909) 198, 204.

[117]In the argument of the Australian case of Howe *v.* Lees, counsel for defendant said: In Macintosh *v.* Dun, "the motive was to gain a monetary reward. Here the motive is also to gain a reward, *viz.,* similar information to be given in like circumstances by the person to whom the communication is made."

In his dissenting opinion in Howe *v.* Lees, Isaacs, J., said: The motive, upon which the defendants (members who gave information to the secretary) acted, was not "a motive which impelled them merely as members of society, animated by precisely the same considerations as would be supposed to move *all* right-minded fellow-citizens; it was a very special motive,—*viz.,* the selfish desire to preserve for themselves the supposed advantages of the restricted alliance to which they had voluntarily subjected themselves." 11 Commw. L. R. 387, 388.

In that case it was strenuously contended that there was a "common interest" among the members of the association, and that the case was on this ground distinguishable from Macintosh *v.* Dun. But this position seems to us completely refuted in the dissenting opinion of Isaacs, J. He maintains: First, that before the making of the agreement (and apart from the agreement) there was, as among or between the future members, no "common interest" in the sense required to give immunity for libel, *i. e.,* "not such a common interest as would give rise to a privileged occasion." Second, that the agreement of association did not create such a "common interest." 11 Commw. L. R. 381-384; and see argument of counsel, pp. 363-364; *cf.* Hamilton, L. J., in L. R. [1913] 3 K. B. 537, 539.

We think that the principle of the final decision in *Macintosh* v. *Dun,* if correct, is fatal to the claim of immunity in behalf of a mutual trade protection society. But the fact that this principle, if admitted, goes to that extent, constitutes in our view an argument for rejecting it altogether, and for refusing to apply it in the case of a mercantile agency.[118]

Another question as to mutual trade protection societies is discussed in the note below.[119]

---

[118]"Apart from the very wide principle which can be extracted from the judgment in *Macintosh* v. *Dun,* it is difficult to see why communications made by one of these mutual associations to its members should not be privileged. It is clear that in these days it is eminently necessary for a trader to obtain information so as to afford him protection against the risk of contracting bad debts, and the mere fact that this information should be given through some 'clearing-house' to which such trader subscribes seems hardly sufficient to take away the privilege that might exist if the information was given by one trader to another personally. Some distinction may exist between a mercantile agency carried on simply for profit and a mutual association where the subscriptions merely are to cover expenses, but even here a difficulty might arise unless it were held that mutuality of information would create an interest in the informant. The law as it now stands cannot be said to be at all satisfactory for traders, and it is to be hoped that some further pronouncement may be obtained from the House of Lords." Comment on the decision of a majority of the Court of Appeal in Greenlands *v.* Wilmhurst, 135 Law Times, 314.

[119]There is a tendency in Scotland and Australia to allow a "Mutual Trade Protection Society" immunity in one respect where, in the United States, it is denied to a mercantile agency. If a mercantile agency furnishes to its subscribers information respecting persons concerning whom no specific inquiry has been made, then the weight of American authority does not allow immunity. See Sunderlin *v.* Bradstreet (1871) 46 N. Y. 188; King *v.* Patterson (1887) 49 N. J. L. 417. But in Scotland protection is not forfeited although the information about the plaintiff has been communicated to *all* the members of a "Mutual Trade Protection Society" including those who have made no special request for information as well as those who have. Barr *v.* Musselburgh Merchants' Ass'n (1911) Session Cases, 1911-12, 174, s. c. 49 Scottish L. R. 102, 2 Scots L. T. 402. In Australia, the Supreme Court of Victoria, as we understand their opinion, were inclined to apply to mutual trade protection societies the same restrictive doctrine in this respect which American courts apply to mercantile agencies. See Peatling *v.* Watson, Vict. L. R. (1909) 198. But this view of the Victorian Court was practically rejected by a majority of the High Court of Australia in Howe *v.* Lees (1910) 11 Commw. L. R. 361.

Possibly a distinction may be drawn on the following ground. The Association in the Scotch case seems to have been composed of the retail traders in a particular locality, who desired information as to the solvency of customers who might wish to purchase at retail. When a customer comes into a retail store, desiring to make a small purchase on credit, it would often be practically impossible to delay until the storekeeper could obtain information from the Secretary of the Association. If the store-keeper has not already in his possession a copy of the Secretary's report as to possible customers, he can derive no benefit from his membership in the Association, so far as the present individual case is concerned. But the subscribers to a mercantile agency are largely wholesale merchants. When applications for credit are made to them, it would

Now as to the tendency of modern authority:

The tendency in modern times has been to extend the application of the doctrine of conditional privilege.[120] *Prima facie* protection is afforded now to various classes of communications and in various situations, where it would not have been given (allowed) formerly. There was at one time a tendency to regard certain special classes of cases, certain particular situations, as if they were the only ones to which protection could attach. But a broader view has since prevailed; and immunity is now afforded in situations which are "new in the instance" but which are within the spirit of the principle underlying the earlier cases.[121] So, too, modern business customs are taken into account in determining whether the *prima facie* protection is to be deemed forfeited by the employment of methods which are common in modern times and which the present business world deems reasonably necessary.[122]

In his dissenting opinion in *Greenlands* v. *Wilmshurst,*[123] Bray, J., said: "These are not the days when we ought to narrow the law of privilege or lawful excuse. The exigencies of business rather require that it should be extended."

Hamilton, L. J., in his opinion in *Greenlands* v. *Wilmshurst,* apparently disapproves the modern tendency; and seems to think that changes in the law are to be discouraged. His view is not in accord with that enunciated in an earlier defamation case, by Cockburn, C. J., in the following passage, which is now almost classical, and which we had supposed was very generally approved.

"Whatever disadvantages attach to a system of unwritten law, and of these we are fully sensible, it has at least this advantage, that its elasticity enables those who administer it to adapt it to the varying conditions of society, and to the requirements and habits of the age in which we live, so as to avoid the inconsistencies and injustice which arise when the law is no longer

often be practicable to delay a final answer (or at least delay a shipment) until after making special inquiry of the mercantile agency and receiving the desired information. Hence the receipt of information in advance of any special request would not be so important to their interests as it would be in the case of the retail trader.

[120]See Erle, C. J., in Whiteley *v.* Adams (1863) 15 C. B. [N. S.] 392, 418; Bower, Code of the Law of Actionable Defamation, 401-2; 145, note (*c*).

[121]See Higgins, J., 11 Commw. L. R. 395.

[122]See grounds of decision as to the effect of employing a stenographer; Edmondson *v.* Birch, L. R. [1907] 1 K. B. 371. As to "subsidiary publications," *cf.* Odgers, Libel & Slander (5th ed.) 302.

[123]L. R. [1913] 3 K. B. 507, 561.

in harmony with the wants and usages and interests of the generation to which it is immediately applied. Our law of libel has, in many respects, only gradually developed itself into anything like a satisfactory and settled form."[124]

With this compare the language of Hamilton, L. J.:

"Public good fluctuates from time to time, and rules of law should be fixed. We should be on very uncertain ground if we were to hold that this occasion was privileged, because, as trade stands now, many traders find inquiry agencies useful. I think that we must adhere to principle, without extending the categories of privilege, and the principle in this matter is, in my opinon, correctly expressed in *Macintosh* v. *Dun*."[125]

Mr. Bower, who by the way endorses *Macintosh* v. *Dun*, emphasizes the changes already made by the courts in the way of extending the law of privilege, and predicts further changes in the same direction in the future.[126]

He says:

"From the history of the judicial establishment of the several groups mentioned in the text as the subject of defeasible immunity (see App. XIII), scarcely one of which has come within the protected area except by degrees, or without encountering opposition from various quarters at every stage, it seems more than likely that, as social duties interests and relations become more numerous and complex, many other species of publications will, after similar contentions, make good their title to be included in the sphere from which they have hitherto been excluded. This branch of the law of defamation is, like the law merchant, in a constant state of flux, or rather development. It is not a rigid and inelastic body of rules, fixed for all time."

In this connection, the learned author, in addition to Cockburn, C. J., quotes Lord Campbell, C. J.,—"the law upon such subjects must bend to the approved usages of society;"[127] and also quotes from an opinion of Lord Coleridge, C. J., in *Usill* v. *Hales*, tending in the same direction.[128]

As to specific authority:

The decisions in the United States cited in the note below[129]

---

[124]Wason *v.* Walter (1868) L. R. 4 Q. B. 73, 93.

[125]L. R. [1913] 3 K. B. 543.

[126]Code of the Law of Actionable Defamation, 145, note (*c*).

[127]E. B. & E. 537, 560.

[128](1878) 3 C. P. D. 319.

[129]Ormsby *v.* Douglass (1868) 37 N. Y. 477. This may be regarded as the leading case; see especially opinion of Woodruff, J. Erber *v.* Dun (1882) 12 Fed. 526; Trussell *v.* Scarlett (1882) 18 Fed. 214; Locke *v.* Bradstreet (1885) 22 Fed. 771; Crist *v.* Bradstreet (Oh. 1886) 15 Weekly Law Bull. 334.

The same view as to privilege of mercantile agencies is affirmed in Cooley, Torts (2nd ed.) 254-5; and in Bishop, Non-Contract Law, § 305.

sustain the position that a mercantile agency is conditionally privileged in giving to a subscriber information as to the responsibility of a particular person, when such information is communicated in answer to the specific request of the subscriber who has a special interest in acquiring it.

Johnson v. *Bradstreet*[130] is opposed to the foregoing view. The precise point decided was that the statement by the mercantile agency was not a privileged communication within the meaning of §2980 of the Georgia Code. But the language of the opinion leaves no doubt that, if there had been no statute, the court would have held it unprivileged at common law.

In *Beardsley* v. *Tappan*[131] the mercantile agency's claim of privilege was disallowed on the ground of the extent of publicity; the information being known to various employees of the mercantile agency, and being communicated by the agency to employees of the subscribers. The court did not say whether the privilege would be allowed if the mercantile agency were carried on by a single individual, who personally obtained the information and then himself imparted it to the subscriber.

The correctness of the result reached in *Ormsby* v. *Douglass* has repeatedly been recognized in cases where a mercantile agency has been held liable to a plaintiff because its report concerning him was sent to *all* its subscribers; the communication not being limited to persons having a special interest in the plaintiff or who had specially requested information concerning him.[132]

As to Canadian decisions:

Cossette v. *Dun*[133] was a suit originating in the Province of Quebec, which came up on appeal from the Court of Queen's Bench for Lower Canada. The decision was against the mercantile agency. Ritchie, C. J., expressed, in substance, the opinion[134] that a mercantile agency was not entitled to conditional privilege. He also said[135] that the agency in that case was guilty of the greatest negligence and did not take reasonable precautions to ascertain the truth of their statements. Both

[130](1886) 77 Ga. 172.

[131](1867) 5 Blatchf. 497; also reported in 1 Amer. Lead. Cases (5th ed.) 205.

[132]See, for example: Allen, J., in Sunderlin *v.* Bradstreet (1871) 46 N. Y. 188, 192; Depue, J., in King *v.* Patterson (1887) 49 N. J. L. 417, 429, 431.

[133](1890) 18 Sup. Ct. of Canada, 222.

[134]P. 240.

[135]P. 240.

Ritchie, C. J.,[136] and Gwynne, J.,[137] said that the agency had volunteered erroneous statements as to matters which they were not asked about.

In 1897, *Robinson* v. *Dun*[138] was decided. The Ontario Court of Appeal declined to follow the above view of Ritchie, C. J., as to privilege. They held, in accordance with their own previous decision in *Todd* v. *Dun*,[139] that a mercantile agency is entitled to conditional privilege; and said, in substance, that *Cossette* v. *Dun* was not a binding authority on this question in the Province of Ontario.[140]

As to Irish authority:

Fitzsimons v. *Duncan and Kemp & Co., Ltd.*[141] was an action of libel against the local correspondent of a mercantile agency, and also against the mercantile agency itself. The King's Bench Division practically decided that a mercantile agency is entitled to the defence of conditional privilege.[142] They held that the report of the mercantile agency was published on a *prima facie* privileged occasion, but that its privilege was in that case defeated by "malice" on the part of the local correspondent. Hence they gave judgment against the mercantile agency.

In the Court of Appeal, the judges, after the arguments, agreed upon an opinion which disposes of the case in favor of the plaintiff, even though it be assumed that the occasion was *prima facie*

---

[136]Pp. 241-2.

[137]P. 256.

[138]24 Ont. App. 287.

[139](1888) 15 Ont. App. 85.

[140]Burton, C. J., 24 Ont. App. 288. "Some language used by the late Chief Justice of the Supreme Court, in *Cossette* v. *Dun*, 18 S. C. R. 222, would seem to be rather opposed to the view taken by this Court of the doctrine of qualified privilege; but the law of libel and slander under the civil law system of Quebec, derived from France, and our own, are essentially different; and in the case in which that language was used the same result would probably have been arrived at in our own courts, on the ground that the information was voluntarily given to persons who had not sought the information, and even in the case of their clients who were entitled to seek the information it was altogether outside of the matter they were asked to obtain information upon."

Osler, J. A., 24 Ont. App. 295: "*Cossette* v. *Dun*, 18 S. C. R. 222, relied upon by the plaintiff, is a case which, if it does not turn wholly on French law, may be supported on the ground that some of the statements complained of were so wholly irrelevant and improper that no privilege could attach to them, or that there was abundant evidence of actual malice in the sense that the statements were recklessly or wrongfully made."

[141](1908) 2 Ir. R. 483, 507.

[142]See Palles, C. B., pp. 494, 496; and Johnson, J., p. 502.

privileged. After this opinion had been agreed upon, but before its delivery, the Judicial Committee of the Privy Council announced their decision in *Macintosh* v. *Dun.* In the subsequently delivered opinion of the Irish Court of Appeal, the court expressly reserved their judgment "upon the question whether the business of supplying information affecting personal character or mercantile status is privileged on the ground of utility." From the language of Fitz Gibbon, L. J., it may be inferred that he would be against allowing the privilege.[143]

As to Scotch authority:

In *Bayne* v. *Stubbs, Ltd.*,[144] the defendants were held entitled to maintain the defence of conditional privilege. To readers unfamiliar with local nomenclature and usages, it is not entirely clear whether the defendant company should be classed as a mercantile agency or as a mutual trade protection society. If the former, the decision must be regarded as in accord with the weight of American authority. If the latter, it must be viewed as identical with *Barr* v. *Musselburgh Merchants' Ass'n.*[145]

The foregoing statement of the authorities shows that, up to the time of the decision of the Judicial Committee of the Privy Council in *Macintosh* v. *Dun*,[146] the great weight of authority was opposed to the result there reached.

The contrary view was sustained by the clear weight of authority in the United States, and also by the decision of the Court of Appeal in the Province of Ontario, of the King's Bench

[143]Fitz Gibbon, L. J., pp. 513-14: "It has been held at the trial and in the King's Bench, that the Company, in doing the whole business, and that Avery and Duncan each in doing his own part of it, was acting on a 'privileged occasion.' We assume this to be so, and we do not desire to anticipate limitations of 'privilege' attaching to the proper conduct of any lawful business. But we reserve our judgment upon the question whether the business of supplying information affecting personal character or mercantile status is privileged on the ground of utility. It took the Newspaper Libel Act to privilege reports of matters of public interest. 'Stubbs Gazette' has been defended as being merely a useful means of making accessible records which are already public. Speaking for myself, I do not wish prematurely to affirm that defamatory matter, disparaging the character or credit of individuals, is published on a privileged occasion, merely because it may be *useful* that information upon hearsay should be obtainable from people who make a trade of collecting it for reward."

[144](1901) 3 Scotch Session Cases (5th Series) 408.

[145]Session Cases, 1911-12, 174. Hamilton, L. J., who endorses Macintosh *v.* Dun, evidently regards Bayne *v.* Stubbs as in accord with the view prevailing in the United States. See L. R. [1913] 3 K. B. 543.

[146]L. R. [1908] A. C. 390.

Division in Ireland, of the Supreme Court of New South Wales, and of the High Court of Australia.[147]

If the reasoning in this paper is correct, the final decision in *Macintosh* v. *Dun* is indefensible on principle, as well as opposed to the great weight of previous authority.

---

[147]See Macintosh *v.* Dun (1905) 5 N. S. W. St. Rep. 708, s. c. (1906) 3 Commw. L. R. (Australia) 1134.

In his opinion in Greenlands *v.* Wilmshurst, L. R. [1913] 3 K. B. 507, 543, Hamilton, L. J., while endorsing Macintosh *v.* Dun, admits that the decision is opposed to the current of previous authority in other jurisdictions. He says:

"After very careful consideration, the Privy Council there decided to quit the current of decisions which had been running the other way for some time."

"In Scotland, Bayne *v.* Stubbs (3 F. 408), in Ireland, Fitzsimons *v.* Duncan (1908, 2 I. R. 483, at pp. 498, 499), where the observations of Palles, C. B., are very weighty, and many cases in Australia, Canada, and the United States, had held that the communications between inquiry agencies and their customers are made on privileged occasions. The Privy Council declared the English rule to be otherwise."

In Macintosh *v.* Dun, Lord Macnaghten said that the question was bare of direct English authority.

In Greenlands *v.* Wilmshurst, reference is made to the case of David Jones *v.* Basma House, decided by the English Court of Appeal, in March, 1907, one year earlier than Macintosh *v.* Dun. The case is reported in the Shoe and Leather Record, and is stated by Hamilton, L. J., and Bray, J., in their opinions in Greenlands *v.* Wilmshurst, L. R. [1913] 3 K. B. 533, 549, 552-4. The association in Jones *v.* Basma House was identical with the association in the Greenlands case, except in one respect, that in the former case it was confined to the members of one particular trade (the boot and shoe trade). The plaintiffs admitted that the communication was privileged; and hence the question of privilege was not argued by counsel. But one, if not two, of the members of the court thought that the admission was in conformity with the law. Cozens-Hardy, M. R., said: "It was formally admitted in the Court below, and could not be disputed, that the alleged libel in question was on a privileged occasion, and that the plaintiff cannot succeed unless he can establish express malice." And it would seem that Fletcher Moulton, L. J., entertained the same view. See L. R. [1913] 3 K. B. 552-3.

JEREMIAH SMITH.

CAMBRIDGE, MASS.